

Ronald L. Richman, SBN 139189  
Susan J. Olson, SBN 15246  
BULLIVANT Houser Bailey PC  
601 California Street, Suite 1800  
San Francisco, California 94108  
E-mail: ron.richman@bullivant.com  
E-mail: susan.olson@bullivant.com  
Telephone: 415.352.2700  
Facsimile: 415.352.2701

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

Case No.:

**COMPLAINT FOR DAMAGES FOR  
BREACH OF COLLECTIVE  
BARGAINING AGREEMENT, TO  
RECOVER UNPAID TRUST FUND  
CONTRIBUTIONS, FOR BREACH OF  
FIDUCIARY DUTY AND FOR A  
MANDATORY INJUNCTION**

[29 U.S.C. § 185(a) and 29 U.S.C. §§ 1109,  
1132(g)(2), 1145]

BOARD OF TRUSTEES OF THE  
LABORERS HEALTH AND WELFARE  
TRUST FUND FOR NORTHERN  
CALIFORNIA; BOARD OF TRUSTEES OF  
THE LABORERS VACATION-HOLIDAY  
TRUST FUND FOR NORTHERN  
CALIFORNIA; BOARD OF TRUSTEES OF  
THE LABORERS PENSION TRUST FUND  
FOR NORTHERN CALIFORNIA; and  
BOARD OF TRUSTEES OF THE  
LABORERS TRAINING AND RETRAINING  
TRUST FUND FOR NORTHERN  
CALIFORNIA,

Plaintiffs,

vs.

KURT ALBIN ERNST individually and doing  
business as ERNST MECHANICAL  
COMPANY, a California Company,

Defendants.

Now come the Plaintiffs, hereinabove named, and for their causes of action against  
Defendants, and each of them, allege as follows:

**I. JURISDICTION AND VENUE**

1. This is an action for damages for breach of the collective bargaining agreement  
described below, for recovery of unpaid trust fund contributions, for breach of fiduciary duty

## II. PARTIES

4. Each of the Trust Funds is a third party beneficiary of the collective bargaining agreement described below.

1           5.       At all times mentioned herein, each of the Trust Funds was an express trust  
2 created by a written trust agreement subject to and pursuant to § 302 of the Labor Management  
3 Relations Act, 29 U.S.C. § 186, and a multi-employer benefit plan within the meaning of  
4 sections 3 and 4 of ERISA, 29 U.S.C. §§ 1002, 1003.

5           6.       The Trust Funds provide a variety of benefits for laborers, retired laborers and  
6 other related covered employees on whose behalf contributions are made pursuant to collective  
7 bargaining agreements. The duties of the Board of Trustees of the Trust Funds include ensuring  
8 that employers who are signatories to said collective bargaining agreements comply with the  
9 terms of those agreements with respect to payments and contributions to the Trust Funds.

10          7.       Plaintiffs are informed and believe, and upon that ground allege, that at all times  
11 material hereto, Ernst Mechanical Company is an unincorporated sole proprietorship of its  
12 owner, Kurt Albin Ernst, ("Ernst Mechanical") and is a business entity with its principal place  
13 of business located in San Leandro, California. Plaintiffs are further informed and believe, and  
14 upon that ground allege, that Ernst Mechanical is and has been an employer within the meaning  
15 of Section 3(5) and Section 515 of ERISA, 29 U.S.C. §§ 1002(5), 1145 and an employer in an  
16 industry affecting commerce within the meaning of Section 301 of the LMRA, 29 U.S.C. § 185.  
17 Plaintiffs are informed and believe, and upon that ground allege, that at all relevant times,  
18 defendant Kurt Albin Ernst ("Kurt Ernst") was an individual who was and is the sole proprietor  
19 and owned, operated and controlled Ernst Mechanical and that Kurt Ernst acted directly or  
20 indirectly in the interest of Ernst Mechanical with respect to the plaintiff employee benefit  
21 plans, and that, at all relevant times, defendant Kurt Ernst was an employer within the meaning  
22 of Section 3(5) and Section 515 of ERISA, 29 U.S.C. §§ 1002(5), 1145. Plaintiffs are informed  
23 and believe, and on that ground allege, that at all relevant times defendants constituted a single  
24 employer.

### 25                                   **III.     FIRST CLAIM FOR RELIEF**

#### 26                                   **(Breach of Collective Bargaining Agreement)**

27          8.       Plaintiffs reallege and incorporate by reference, as though fully set forth, the  
28 allegations contained in paragraphs 1-7 of this Complaint.

1           9.       By virtue of signing a memorandum agreement, defendants became bound to a  
2 written collective bargaining agreement with the Northern California District Council of  
3 Laborers ("Laborers Union") entitled the Laborers' Master Agreement For Northern California  
4 ("Master Agreement"). In agreeing to be bound to the Master Agreement, defendants further  
5 agreed to be subject to and bound by all provisions and conditions of the written Trust  
6 Agreements which established the trust funds. Pursuant to the provisions of the Master  
7 Agreement, defendants agreed to be bound by all terms relating to wages, hours and conditions  
8 of employment prescribed therein with the Laborers' Union.

9           10.      By virtue of the Master Agreement and written trust agreements, defendants  
10 promised and agreed that: (1) they would pay employee fringe benefit contributions into each  
11 Trust Fund in regular monthly installments commencing on or before the 15th day of the month  
12 immediately succeeding the month in which the employee's work was performed; (2) that in the  
13 event that any of said monthly installments were not paid in full on or before the 25th day of the  
14 month in which such contributions became due, they would pay interest on the delinquent  
15 contribution in the amount of 1.5% per month until paid in full, and would also pay the amount  
16 of \$150.00 for each delinquent contribution as liquidated damages, and not as a penalty; and (3)  
17 that if any suit with respect to any of said contributions or payments were filed against them,  
18 defendants would pay into said Trust Funds the attorneys' fees, costs and all other expenses  
19 incurred in connection with such suit.

20           11.      The Master Agreement between the Union and defendants has never been  
21 terminated.

22           12.      Plaintiffs have performed all conditions, covenants and promises on their part to  
23 be performed in accordance with the terms and conditions of the Master Agreement and trust  
24 agreements.

25           13.      Within four years last past, defendants materially breached and broke the  
26 aforesaid Master Agreement and trust agreements in the following respects:

27       ///

28       ///



- 1 a. by failing to report and pay all employee fringe benefit contributions  
2 into each Trust Fund for the period January 2003 through May 2005 in  
3 the principal amount of \$39,164.45; and  
4 b. by failing to pay interest and liquidated damages on the unpaid and  
5 delinquent employee fringe benefit contributions calculated to be  
6 \$28,520.82 as of December 25, 2007.

7 14. The aforesaid material breaches proximately caused damages to plaintiffs in the  
8 following approximate amounts, all according to proof at trial, for unpaid contributions (not  
9 reported, not paid) in the principal amount of \$39,164.45 plus interest and liquidated damages;  
10 and calculated to be \$28,520.82 as of December 25, 2007. Interest will continue to accrue at the  
11 rate of 1.5% each month during the pendency of this lawsuit.

12 15. Plaintiffs have incurred and will continue to incur attorneys' fees in the within  
13 action. Pursuant to the provisions of the Master Agreement and the trust agreements, Plaintiffs  
14 request that the Court award plaintiffs their attorneys' fees and costs incurred in the bringing of  
15 the within action.

16 WHEREFORE, plaintiffs pray for judgment as set forth below.

17 **IV. SECOND CLAIM FOR RELIEF**

18 **(Recovery of Unpaid Trust Fund Contributions)**

19 **(ERISA §§ 502(g)(2), 515)**

20 16. Plaintiffs reallege and incorporate by reference, as though fully set forth, the  
21 allegations contained in paragraphs 1-15 of this Complaint.

22 17. ERISA Section 515, 29 U.S.C. §1145, requires defendants to make such  
23 contributions to the plaintiff Trust Funds as are required under the terms of their collective  
24 bargaining agreement with the Union. Pursuant to the provisions of their trust agreements,  
25 plaintiffs are entitled to enforce defendants' obligations to make those contributions.

26 18. Plaintiffs are informed and believe, and on that ground allege, that defendants:  
27 failed to report and pay all employee fringe benefit contributions into each Trust Fund for the  
28 period January 2003 through May 2005 in the principal amount of \$39,164.45, according to

1 proof at trial. Defendants are further obligated by the provisions of the Master Agreement and  
2 the trust agreements to pay interest on unpaid contributions at the rate of 1.5% per month until  
3 paid and liquidated damages in the amount of \$150.00 for each month that defendants failed to  
4 timely report and pay all employee fringe benefit contributions into each Trust Fund.

5 19. Pursuant to the provisions of ERISA, Section 502(g)(2), 29 U.S.C. §1132(g)(2),  
6 plaintiffs are entitled to the following statutory relief:

7 (a) Section 502(g)(2)(A): for contributions not reported and not paid, an award  
8 of the unpaid fringe benefit contributions in the approximate principal  
9 amount of \$39,164.45, according to proof at trial;

10 (b) Section 502(g)(2)(B): for contributions not reported and not paid, an award  
11 of interest on the unpaid fringe benefit contributions at the rate of 1.5% per  
12 month, from the date of the delinquency, until the date of judgment,  
13 calculated to be \$25,370.82 as of December 25, 2007;

14 (c) Section (g)(2)(C): the additional award of an amount equal to the greater of  
15 (i) interest on the unpaid fringe benefit contributions at the rate of 1.5% per  
16 month, from the date of the delinquency, until the date of judgment or  
17 liquidated damages [\$25,370.82]; or (ii) liquidated damages under the Master  
18 Agreement and trust agreements of \$150.00 for each month that defendants  
19 failed to timely report and pay all employee fringe benefit contributions into  
20 each Trust Fund, calculated to be: \$3,150.00 as of December 25, 2007 for  
21 contributions not reported and not paid.

22 20. Plaintiffs have incurred and will continue to incur attorneys' fees in the within  
23 action. Pursuant to the provisions of §502(g)(2)(D) of ERISA, 29 U.S.C. §1132(g)(2)(D),  
24 plaintiffs request that the Court award plaintiffs their attorneys' fees and costs incurred in the  
25 bringing of the within action.

26 WHEREFORE, plaintiffs pray for judgment as set forth below.

27 ///

28 ///

**V. THIRD CLAIM FOR RELIEF**

**(Breach of Fiduciary Duty)**

**(ERISA §§ 409(a) and 502(a)(2))**

21. Plaintiffs reallege and incorporate by reference, as though fully set forth, the allegations contained in paragraphs 1-20 of this Complaint.

22. Pursuant to the trust agreements establishing the Trust Funds, the funds' assets include employee fringe benefits contributions that are required to be made to the Trust Funds. Employee fringe benefit contributions that are due and become delinquent are therefore assets of the Trust Funds.

23. Plaintiffs are informed and believe, and on that ground allege, that at all relevant times, Kurt Ernst, as the sole proprietor of Ernst Mechanical, exercised authority or control over the payment of the employee fringe benefit contributions required to be made to the Trust Funds by Ernst Mechanical and that Kurt Ernst was a fiduciary as defined by ERISA Section 3(21), 29 U.S.C. § 1002(21), and was therefore also a party in interest as defined by ERISA Section 3(14)(A), 29 U.S.C. § 1002(14)(A). At all relevant times, defendant Kurt Ernst was an employer whose employees were covered by the Trust Funds' plans and was a party in interest within the meaning of ERISA Section 3(14)(C), 29 U.S.C. § 1002(4)(C).

24. Plaintiffs are informed and believe, and on that ground allege, that defendant Kurt Ernst's role in Ernst Mechanical's failure to make the employee fringe benefit contributions that became due to the Trust Funds constituted a breach of his fiduciary duties, in that he failed to act for the exclusive purpose of providing benefits to participants in the Trust Funds' plans and their beneficiaries, and instead dealt with these assets of the Trust Funds in his own interest and/or in the interest of Ernst Mechanical. Plaintiffs are authorized to seek relief for this breach under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2). As a result of said breaches, defendant Ernst has become indebted to plaintiffs as follows:

- a. by failing to report and pay all employee fringe benefit contributions into each Trust Fund for the period January 2003 through May 2005 in the principal amount of \$39,164.45; and

b. by failing to pay interest and liquidated damages on the unpaid and delinquent employee fringe benefit contributions calculated to be \$28,520.82 as of December 25, 2007.

The aforesaid material breaches proximately caused damages to plaintiffs in the following approximate amounts, all according to proof at trial: for unpaid contributions (not reported, not paid) in the principal amount of \$39,164.45 plus interest and liquidated damages; and calculated to be \$28,520.82 as of December 25, 2007. Interest will continue to accrue at the rate of 1.5% each month during the pendency of this lawsuit.

25. In addition, pursuant to ERISA Section 409(a), 29 U.S.C. § 1109(a), plaintiffs request that the Court grant plaintiffs such further remedial relief as the court deems just and proper.

WHEREFORE, plaintiffs pray for judgment as set forth below.

#### **VI. FOURTH CLAIM FOR RELIEF**

##### **(Mandatory Injunction)**

##### **(ERISA § 502(g)(2)(E))**

26. Plaintiffs reallege and incorporate by reference, as though fully set forth, the allegations contained in paragraphs 1-26 of this Complaint.

27. Pursuant to the terms and conditions of the Master Agreement and trust agreements, defendants are required to allow the Trust Funds access to their books and records to determine the amount of trust fund contributions due and owing. Plaintiffs have, as one of their purposes, the obligation to ensure that contributions required to be made to the Trust Funds are fully and correctly made. The purposes of the respective funds are to provide health and welfare, vacation, pension and other benefits for laborers, retired laborers and other related covered employees on whose behalf contributions are made, which benefits are supported by such contributions, and to ensure that employers who are signatories to the collective bargaining agreement referred to herein comply with the terms of the agreement with respect to the payment of contributions to the Trust Funds.

///



28. Pursuant to ERISA § 502(g)(2)(E), 29 U.S.C. § 1132(g)(2)(E), the Court may award such other legal or equitable relief as the Court deems appropriate, and pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), plaintiffs are entitled to obtain appropriate equitable relief for the breaches alleged herein. Plaintiffs seek a mandatory injunctive order of this Court ordering and requiring defendants to permit plaintiffs' auditor access to the books and records of defendants, in order to permit plaintiffs to verify the precise amounts owed by defendants to the Trust Funds.

29. Plaintiffs seek a mandatory injunctive order from this Court because plaintiffs have no adequate legal remedy in that an audit of the books and records of defendants is the only means to accurately verify the additional amounts owed by defendants to the Trust Funds.

WHEREFORE, plaintiffs pray for judgment as set forth below.

#### **VII. RELIEF REQUESTED**

WHEREFORE, plaintiffs pray for judgment as follows:

1. On the First Claim for Relief, for damages for breach of the collective bargaining agreement for judgment against the defendants, and each of them, for unpaid contributions (not reported, not paid) in the principal amount of \$39,164.45 plus interest and liquidated damages, calculated to be \$28,520.82 as of April 25, 2007, all additional accrued interest and liquidated damages, and such other or further amounts as may be shown at trial and as may be discovered after plaintiffs have had the opportunity to conduct an audit of defendants' books and records, for costs of suit, attorneys' fees and for such other further relief as the Court may deem just and proper.

2. On the Second Claim for Relief, for recovery under ERISA § 502(g)(2), 29 U.S.C. § 1132(g)(2), for judgment against the defendants, and each of them, as follows: (a) under Section 502(g)(2)(A) - for contributions not reported and not paid, an award of the unpaid fringe benefit contributions in the approximate principal amount of \$39,164.45, according to proof at trial; (b) under Section 502(g)(2)(B) - for contributions not reported and not paid, an award of interest on the unpaid fringe benefit contributions at the rate of 1.5% per month, from the date of the delinquency, until the date of judgment, calculated to be \$25,370.82 as of December 25,

2007; and (c) Section (g)(2)(C) - the additional award of an amount equal to the greater of (i) interest on the unpaid fringe benefit contributions at the rate of 1.5% per month, from the date of the delinquency, until the date of judgment or liquidated damages [\$25,370.82]; or (ii) liquidated damages under the Master Agreement and trust agreements of \$150.00 for each month that defendants failed to timely report and pay all employee fringe benefit contributions into each Trust Fund, calculated to be: \$3,150.00 as of December 25, 2007 for contributions not reported and not paid; (d) all additional accrued interest and liquidated damages, and such other or further amounts as may be shown at trial and as may be discovered after plaintiffs have had the opportunity to conduct an audit of defendants' books and records, for costs of suit, attorneys' fees and for such other further relief as the Court may deem just and proper.

3. On the Third Claim for Relief, for breach of fiduciary duty under ERISA § 409(a), 29 U.S.C. § 1109(a), for judgment against defendant Ernst, for unpaid contributions (not reported, not paid) in the principal amount of \$39,164.45 plus interest and liquidated damages, calculated to be \$28,520.82 as of December 25, 2007 plus all additional accrued interest and liquidated damages, and such other or further amounts as may be shown at trial and as may be discovered after plaintiffs have had the opportunity to conduct an audit of defendants' books and records, for costs of suit, attorneys' fees and for such other further relief as the Court may deem just and proper.

4. On the Fourth Claim for Relief, that defendants be compelled to forthwith submit to an audit by an auditor selected by plaintiffs, which audit is to be conducted at the premises of defendants during business hours, at a reasonable time or times, and to allow said auditor to examine and copy such books, records, papers and reports of defendants that are relevant to the enforcement of the collective bargaining agreement and trust agreements, including, but not

///

///

///

///

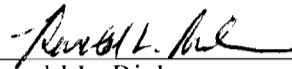
limited to, the following for the period of June 1, 2005 through the present:

California Quarterly Report of Wages, Form DE-6; Federal Tax Forms W-3/W-2 and 1069/1099; Payroll Registers/Journals; Individual Earnings Records; Source Records, including time cards and time card summaries for all employees; contribution reports for all trust funds; workers' compensation reports; certified payroll reports; personnel records indicating job classifications and hire/termination dates; cash disbursement journal; vendor invoices; copies of subcontract agreements; cash receipts journal; general ledger; job cost records; records of related entities; and any other books and records that may be necessary to complete the auditor's determination or provide additional explanation.

DATED: January 17, 2008

BULLIVANT HOUSER BAILEY PC

By

  
Ronald L. Richman

Attorneys for Plaintiffs